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MFS Sdn Bhd v P Vivekananda a/l Paniarasalam

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HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-11BNCC-3–05 OF 2023
JAMHIRAH ALI JC
24 OKTOBER 2024

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Moneylenders — Accounts — Statement of — Licensed moneylender sued borrower for monies due under moneylending agreement — Magistrate dismissed claim on ground moneylender failed to exhibit statement of account in cause papers when action was filed — Whether non-compliance with s 21 of Moneylenders Act 1951 ('the MA') was fatal to moneylender's claim — Whether moneylending agreement was valid despite s 21 non-compliance — Whether s 21 non-compliance rendered moneylender's writ and statement of claim a nullity — Moneylenders Act 1951 ss 19 & 2

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Contract — Restitution — Contracts Act 1950 s 66 — Court held moneylending agreement although valid was unenforceable due to plaintiff's failure to comply with s 21 of MA — Plaintiff failed to alternatively plead that principal loan sum should be refunded and that defendant would be unjustly enriched otherwise — Court held moneylending agreement was valid and not illegal or void (whether ab initio or upon later discovery) — Whether moneylender could not obtain refund of principal loan sum under s 66 of CA — Whether allowing refund would permit moneylenders to disregard strict requirements of MA and erode integrity of legal safeguards upheld by courts to ensure strict compliance with MA's provisions

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The appellant ('plaintiff') was a licensed moneylender which had disbursed an unsecured loan of RM30,000, carrying an interest rate of 18%pa, to the respondent ('defendant') pursuant to a moneylending agreement. The defendant had agreed to repay the loan over 60 monthly installments of RM950 each with payments due on the ninth of each month. The defendant failed to pay even the first installment, causing the plaintiff to terminate the agreement and sue for recovery of all monies payable thereunder. Following a full trial, the magistrate held that although the agreement between the parties was valid and that the plaintiff had proven its case, the claim could not be allowed because of the plaintiff's failure to comply with s 21 of the Moneylenders Act 1951 ('the MA'), which required it to have exhibited a statement of its account with the defendant (as prescribed in s 19 of the MA) at the time the action was filed. In the instant appeal against the decision, the plaintiff argued that since the defendant had never disputed the fact that he had

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not repaid the loan, the production of the s 19 of the MA statement of account should not be held to be fatal. The plaintiff submitted that the defendant had never raised the issue of non-compliance with s 21 of the MA at any time before written submissions were filed after the trial was over and that such last-minute raising of the issue had taken the plaintiff by surprise, seriously prejudiced it, and deprived the plaintiff of the opportunity to address the issue. Alternatively, the plaintiff submitted that even if it could not enforce the moneylending agreement, it should have been granted a refund of the RM30,000 principal loan sum pursuant to s 66 of the Contracts Act 1950. Not allowing the refund was unfair and unjust to the plaintiff and an unjust enrichment to the defendant.

Held, dismissing the appeal:

(1) Compliance with s 21 of the MA was mandatory. When a moneylender sued for recovery of his loan, a statement of account as prescribed under s 19 of the MA must be submitted at the time the suit was filed. Non-compliance with this statutory requirement was an irregularity that the court could not ignore, entitling the defendant to have the suit dismissed with costs (see para 30).

(2) Given that the MA's purpose was to safeguard borrowers and not merely to confer a benefit upon them, non-compliance with s 21 of the MA could not be excused or overlooked simply because the defendant was aware of the amount owed and purportedly had 'waived' the need for compliance. Section 21 was enacted specifically to protect the borrower and any failure to comply undermined that fundamental protection (see para 31).

(3) Whilst it was trite that a question of law did not need to be pleaded, the defendant was still required to present facts that could support the legal conclusion. In para 11 of his statement of defence, the defendant had, in fact, pleaded that the statement of account was not provided and that the plaintiff had not complied with the provisions of the MA (see para 37).

(4) As compliance with s 21 of the MA was mandatory, the defendant was not obligated to specifically plead or inform the plaintiff that the statement of account was not attached to the writ and statement of claim pursuant to s 21 of the MA. The MA imposed the burden of strict adherence to its provisions on the moneylender, not the borrower (see para 38).

(5) The obligation to comply with the provisions of the MA rested with the plaintiff, not the defendant. Compliance was mandatory, and the fact that the defendant raised the issue of non-compliance with s 21 only at the stage of written submissions did not exempt the court from enforcing the legal requirements. The court could not overlook the plaintiff's

failure to meet its obligations, regardless of whether it resulted in prejudice or denied the plaintiff of a fair opportunity to respond. Any alleged prejudice or lack of opportunity was due to the plaintiff's own negligence or oversight. The plaintiff could not now claim unfair treatment or shift the blame to the defendant for not giving notice of the non-compliance. The responsibility lay solely with the plaintiff, which was expected to be fully aware of, and to adhere to, the legal requirements governing its trade (see para 42).

(6) The remedy of restitution under s 66 of the Contracts Act 1950 ('the CA') was not available to the plaintiff for two reasons: (a) the plaintiff did not plead in the alternative for restitution of the principal sum (or plead the facts supporting a claim for such restitution); nor did it plead that the defendant would be unjustly enriched if it failed to return the principal sum. The plaintiff could have amended its statement of claim to include an alternative plea for restitution of the principal amount when it became aware of the issue, but it took no such action; and (b) the agreement between the plaintiff and the defendant was valid, not void. The plaintiff's failure to comply with s 21 of the MA was a procedural lapse that did not render the agreement illegal, void ab initio or void at a later stage but rendered the writ and statement of claim a nullity (see paras 55, 60 & 62).

(7) Section 66 of the CA was not intended to supersede the provisions of the MA that could render certain contracts void. Instead, it provided relief to parties whose agreements had become unenforceable due to factors beyond their control. In this case, the obligation to fulfill the requirements under s 19 of the MA, as mandated by s 21 of the MA, was within the plaintiff's control and the subsequent discovery of the non-compliance did not change or invalidate the agreement retroactively. In other words, the agreement remained valid despite the later realisation of the procedural issue (see para 63).

(8) Allowing the plaintiff's claim, even for the principal sum, was to effectively permit a moneylender — even a licensed one — to disregard the strict requirements imposed by the MA. This would erode the integrity of the legal safeguards that the courts had consistently upheld to ensure compliance with the MA (see para 64).

[Bahasa Malaysia summary

Perayu ('plaintif') adalah pemberi pinjaman wang berlesen yang telah memberikan pinjaman tidak bercagar sebanyak RM30,000 dengan kadar faedah sebanyak 18% setahun, kepada responden ('defendan') menurut perjanjian peminjaman wang. Defendan telah bersetuju untuk membayar balik pinjaman lebih 60 ansuran bulanan sebanyak RM950 setiap bulan dengan bayaran perlu dibayar pada 9hb setiap bulan. Defendan gagal

membayar walaupun ketika pembayaran ansuran pertama, menyebabkan plaintif menamatkan perjanjian dan menuntut pengembalian semua wang yang perlu dibayar. Selepas perbicaraan penuh, majistret memutuskan bahawa walaupun perjanjian antara pihak-pihak adalah sah dan plaintif telah membuktikan kesnya, tuntutan itu tidak boleh dibenarkan kerana kegagalan plaintif untuk mematuhi s 21 Akta Pemberi Pinjam Wang 1951 ('APPW') yang mewajibkan plaintif mempamerkan penyata akaunnya dengan defendan (seperti yang ditetapkan dalam s 19 APPW) pada masa tindakan itu difailkan. Dalam rayuan ini terhadap keputusan itu, plaintif berhujah bahawa oleh sebab defendan tidak pernah mempertikaikan fakta bahawa dia tidak membayar balik pinjaman, kegagalan mengemukakan penyata akaun s 19 APPW tidak boleh dianggap sebagai serius. Plaintif berhujah bahawa defendan tidak pernah membangkitkan isu ketidakpatuhan terhadap s 21 APPW pada bila-bila masa sebelum penghujahan bertulis difailkan selepas perbicaraan selesai dan pada saat-saat akhir isu ini dibangkitkan dan mengejutkan plaintif, memprejudiskannya dengan serius dan menafikan peluang plaintif untuk menjawab isu tersebut. Sebagai alternatif, plaintif berhujah bahawa walaupun mereka tidak dapat menguatkuasakan perjanjian pinjaman wang, mereka sepatutnya diberikan bayaran balik jumlah pinjaman pokok RM30,000 menurut seksyen 66 Akta Kontrak 1950. Tidak membenarkan bayaran balik adalah tidak adil kepada plaintif dan memberikan pengkayaan yang tidak adil kepada defendan.

Diputuskan, menolak rayuan:

(1) Pematuhan terhadap s 21 APPW adalah wajib. Apabila pemberi pinjaman wang menyaman untuk mendapatkan semula pinjamannya, penyata akaun yang ditetapkan di bawah s 19 APPW haruslah dikemukakan ketika masa saman itu difailkan. Ketidakpatuhan terhadap keperluan undang-undang ini adalah kesalahan yang tidak boleh diabaikan oleh mahkamah, melayakkan defendan untuk mengenepikan saman itu dengan kos (lihat perenggan 30).

(2) Memandangkan tujuan APPW adalah untuk melindungi peminjam dan bukan semata-mata untuk memberikan faedah kepada mereka, ketidakpatuhan terhadap s 21 APPW tidak boleh dimaafkan atau diabaikan hanya kerana defendan mendapati terdapat jumlah yang terhutang dan 'mengenepikan' keperluan untuk mematuhi peruntukan tersebut. Seksyen 21 telah digubal khusus untuk melindungi peminjam dan sebarang kegagalan untuk mematuhinya menjejaskan perlindungan asas itu (lihat perenggan 31).

(3) Walaupun menjadi undang-undang mantap bahawa persoalan undang-undang tidak perlu diplidkan, defendan masih dikehendaki mengemukakan fakta yang boleh menyokong kesimpulan undang-undang. Dalam perenggan 11 pernyataan pembelaannya,

defendan sebenarnya telah mengaku bahawa penyata akaun tidak dikemukakan dan bahawa plaintif tidak mematuhi peruntukan APPW (lihat perenggan 37).

(4) Oleh kerana pematuhan terhadap s 21 APPW adalah wajib, defendan tidak diwajibkan untuk secara khusus untuk memplidkan atau memaklumkan plaintif bahawa penyata akaun tidak dilampirkan pada writ dan penyata tuntutan menurut s 21 APPW. APPW mengenakan beban pematuhan ketat kepada pemberi pinjaman wang, bukannya kepada peminjam (lihat perenggan 38).

(5) Kewajipan untuk mematuhi peruntukan APPW terletak pada plaintif, bukannya defendan. Pematuhannya adalah wajib dan fakta bahawa defendan membangkitkan isu ketidakpatuhan terhadap s 21 hanya pada peringkat hujahan bertulis tidak mengecualikan mahkamah daripada menguatkuasakan keperluan undang-undang. Mahkamah tidak boleh mengabaikan kegagalan plaintif untuk memenuhi kewajipannya, tidak kira sama ada ianya mengakibatkan prejudis atau menafikan peluang yang adil kepada plaintif untuk menjawab. Sebarang dakwaan prasangka atau kekurangan peluang adalah disebabkan oleh kecuaian plaintif sendiri. Plaintif kini tidak boleh menuntut layanan yang tidak adil atau mengalihkan kesalahan kepada defendan kerana tidak memberi notis ketidakpatuhan. Tanggungjawab terletak semata-mata pada plaintif yang sepatutnya boleh dijangka dan mematuhi keperluan undang-undang yang mengawal prosesnya (lihat perenggan 42).

(6) Remedi pengembalian di bawah s 66 Akta Kontrak 1950 ('AK') tidak terpakai kepada plaintif atas dua sebab: (a) plaintif tidak memplidkan dalam alternatif untuk pengembalian jumlah pokok (atau memplidkan fakta yang menyokong tuntutan untuk pengembalian tersebut); mereka juga tidak memplidkan bahawa defendan akan memperoleh pengkayaan secara tidak adil sekiranya gagal memulangkan jumlah prinsipal. Plaintif boleh meminda pernyataan tuntutannya untuk memasukkan pernyataan alternatif untuk pengembalian jumlah pokok apabila menyedari isu tersebut tetapi tidak mengambil tindakan sedemikian; dan (b) perjanjian antara plaintif dan defendan adalah sah dan tidak terbatal. Kegagalan plaintif untuk mematuhi s 21 APPW adalah kesilapan prosedur yang tidak menjadikan perjanjian itu menyalahi undang-undang, tidak sah ab initio atau tidak sah pada peringkat kemudian tetapi menjadikan writ dan pernyataan tuntutan itu terbatal (lihat perenggan 55, 60 & 62).

(7) Seksyen 66 AK tidak bertujuan untuk menggantikan peruntukan APPW yang boleh menyebabkan sesetengah kontrak tidak sah. Sebaliknya, ianya memberikan relif kepada pihak yang perjanjiannya tidak boleh dikuatkuasakan kerana faktor di luar kawalan mereka. Dalam kes ini, kewajipan untuk memenuhi keperluan di bawah s 19 APPW, seperti yang disokong oleh s 21 APPW, berada dalam kawalan plaintif dan

penemuan ketidakpatuhan seterusnya tidak mengubah atau membatalkan perjanjian secara kebelakang. Selain itu, perjanjian itu kekal sah walaupun isu prosedur telah diselesaikan kemudiannya (lihat perenggan 63).

(8) Membenarkan tuntutan plaintif, walaupun untuk jumlah prinsipal, membenarkan pemberi pinjaman wang — walaupun yang berlesen — untuk mengabaikan keperluan mandatori yang dikenakan oleh APPW. Hal ini akan menghakis integriti perlindungan undang-undang yang mahkamah secara konsisten memastikan pematuhan APPW (lihat perenggan 64).]

Cases referred to

AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd and another appeal [2008] 4 MLJ 487, CA (refd)

Aseam Credit Sdn Bhd v Eminent Avenue Sdn Bhd [2008] 1 MLJ 441, CA (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Golden Wheel Credit Sdn Bhd v Dato' Siah Teong Din [2023] 11 MLJ 647; [2023] 6 CLJ 438, HC (refd)

Harnath Kaur v Indar Bahadur Singh (1922) LR 50 Ind App 69, PC (refd)

He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal [2020] 4 MLJ 662; [2020] 5 MLRA 98, FC (refd)

Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)

Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 99, FC (refd)

Mahmood bin Ooyub v Li Chee Loong and another appeal [2020] 6 MLJ 755, CA (refd)

Menaka v Lum Kum Chum [1977] 1 MLJ 91; [1976] 1 LNS 181, PC (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Orix Credit Malaysia Sdn Bhd v Mohd Ikbal bin Ismail & Anor [2010] 1 LNS 1942, HC (refd)

Powernet Industries Sdn Bhd v Golden Wheel Credit Sdn Bhd [2020] 12 MLJ 412, CA (refd)

Tan Chow Soo v Ratna Ammal [1969] 2 MLJ 49, PC (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (refd)

Shanmuganathan a/l Venugopal v Azizie bin Din [2015] MLJU 1967; [2015] 5 CLJ 1096, HC (refd)

Simcity-ETE Venture Sdn Bhd v Koperasi Pembangunan Kampung Tradisional

Tasek Pulau Pinang Bhd [2021] MLJU 2225, CA (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Soh Eng Keng v Lim Chin Wah [1979] 2 MLJ 91 (refd)
Sornaratnam & Anor v Ramalingam [1981] 1 MLJ 24, FC (refd)

Legislation referred to

Contracts Act 1950 s 66
Moneylenders Act 1951 ss 19, 21

Manmohan Singh a/l Manjit Singh (Manmohan Manjit & Co) for the appellant.
Mugunthan a/l Vadiveloo (Mugu & Sufyan & Co) for the respondent.

Jamhirah Ali JC:

INTRODUCTION

[1] This is the appellant/plaintiff's appeal against the decision of the learned magistrate on 3 May 2023 dismissing the appellant/plaintiff's claim against the defendant.

[2] For ease of reference parties would be referred to as they were at the court below.

BRIEF FACTS

[3] The plaintiff is a licensed moneylender under the Moneylenders Act 1951 (Moneylenders Act), conducting business as a financial institution that offers credit facilities in accordance with the provisions of the Act. The defendant, at all material times, was a borrower and customer of the plaintiff, having entered into a Money lending agreement (unsecured loan) dated 9 January 2020 ('the agreement'). Under this agreement, the plaintiff loaned RM30,000 to the defendant at an interest rate of 18%pa, subject to the terms and conditions outlined in the agreement.

[4] The agreement was executed on 3 January 2020, stamped on 9 January 2020, and a copy was provided to the defendant. The loan was disbursed in cash, and the defendant agreed to repay it in monthly instalments of RM950 over 60 months, with payments due on the ninth of each month. However, the defendant failed to make the first instalment due on 9 February 2020, thereby breaching the terms of the agreement. Due to the defendant's failure to make payments, the plaintiff terminated the agreement on 9 February 2020, pursuant to cl 3(1)(a) of the agreement.

[5] On 9 December 2020, the plaintiff issued a notice of demand and

termination, claiming the outstanding sum of RM57,634.63 as of 9 December 2020, along with interest at 5%pa, calculated daily until full repayment. Despite the notice, the defendant failed to settle the amount within the stipulated 14-day period. The plaintiff then filed a writ of summons and statement of claim on 7 December 2021, seeking the outstanding sum, interest, costs, and any other relief deemed appropriate by the court.

[6] After a full trial, the magistrate ruled that while the plaintiff had proven its claim, the claim was dismissed due to non-compliance with s 21 of the Moneylenders Act. As a result, the plaintiff was ordered to pay the defendant RM4,000 in costs.

[7] On appeal, this court agreed with the magistrate that non-compliance with s 21 of the Moneylenders Act is fatal.

THE MAGISTRATES' COURT FINDINGS

[8] The magistrate ruled that the defendant failed to refute the plaintiff's case, as the defence consisted solely of denials without any concrete evidence to support it. The defendant claimed to have filled out and signed an empty form and received the loan funds before being provided with a complete copy of the agreement.

[9] However, based on the witness testimony and the exhibits submitted in court, specifically:

(a) the loan agreement;

(b) the loan disbursement voucher, where the defendant acknowledged receiving RM30,000 in cash; and

(c) the defendant's acknowledgement letter, where the defendant confirmed receipt of the original stamped and completed agreement,

it was established that the plaintiff and the defendant signed the agreement on 3 January 2020, before a commissioner for oaths. The agreement was stamped on 9 January 2020 and was handed to the defendant on the same day he received the loan in cash from the plaintiff. The defendant, however, failed to present any evidence to substantiate his claims, rendering them mere denials.

[10] The magistrates' court did not decide on the repayment of the principal loan amount, as the plaintiff did not plead it in his statement of claim. While the court found the agreement valid, the plaintiff's claim was dismissed due to non-compliance with s 21 of the Moneylenders Act, which requires the statement of account to be submitted along with the writ and statement of claim when filed in court.

THE LAW ON APPELLATE INTERVENTION

[11] I am reminded that an appellate court should be slow in interfering with a finding of fact by a trial court (see: *Sornaratnam & Anor v Ramalingam* [1981] 1 MLJ 24; Privy Council case of *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 211.

[12] The principles governing the appellate court's interference with the trial court's findings as enunciated in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 is particularly useful here. The Court of Appeal held:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.
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> In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* (1942) 73 Lloyd LR 217:
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> > The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. [Which, we hasten to add, is not the case here.] I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. *If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view* — in these mundane happenings there is no more conclusive argument than non est credendum quia impossibile. *If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.*
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> > If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed. (Emphasis added.)

[13] Furthermore, the Federal Court case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 had clearly demonstrated under what circumstances an appellate court ought to warrant an intervention:

> THE LAW IN APPELLATE INTERVENTION
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> [33] 'It was a *long settled principle, stated and restated in domestic and wider common*

law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong' (the Supreme Court of United Kingdom in *McGraddie v McGraddie and another* [2013] 1 WLR 2477).

[34] The '*plainly wrong*' *test operates on the principle that the trial court has had the advantage of seeing and he aring the witnesses on their evidence as opposed to the appellate court that acts on the printed records. The test was pioneered by the House of Lords in Clarke v Edinburgh and District Tramways Co 1919 SC (HL) 35, when it adjudicated on the ability of an appellate court to reconsider the facts of a particular case, when there is already findings of fact by the lower court.* In this regard, Lord Shaw's judgment is pertinent when His Lordship said:

> *When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect*, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, *thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I-who sit here without those advantages, some times broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case — in a position, not having those privileges, to come to clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.*

[35] Lord Shaw's judgment was adopted by Viscount Sankey LC in *Powell v Streatham Manor Nursing Home* [1935] AC 243 when His Lordship made the following observation at p 250:

> *What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not hear the witnesses. It only reads the evidence and rehears the counsel.* Neither is it a reseeing Court ... On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses.

...

[37] In much later years, the House of Lords had the occasion to consider on the same issue in *Watt (or Thomas) v Thomas* [1947] AC 484, namely, when was it appropriate for an appellate court to set aside the judgment of the court on findings of fact at first instance, and it held that:

> *When a question of fact has been tried by a judge without a jury, and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witness, and should not disturb his judgment unless it is plainly unsound.*
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> The appellate court is however free to reverse his conclusion if the grounds given by him therefore are unsatisfactory by reason of the material inconsistencies or inaccuracies or if it appears unmistakably from the evidence in reaching them, he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.

...

[60] The aforesaid cases illustrate the highly deferential attitude adopted by appellate courts in the United Kingdom towards reviewing findings of fact by the trial court. The test is not whether the higher court feels that it would have reached a different conclusion on the same facts as the trial court, but whether or not the decision by the lower court on findings of fact was reasonable. In other words, if the trial judge's decision can be reasonably explained and justified, then appellate courts should refrain from intervention.

...

[151] It is not sufficient for the Court of Appeal to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. *Although there may be inconsistencies in the evidence which could mean that another judge would have been persuaded to reach a different conclusion, this is not relevant when considering if a trial judge's findings of fact could be overturned. The task of the trial judge is hard enough, without having to deal with every single piece of evidence which may emerge in the course of the trial. If such a requirement was to be imposed on a trial judge then their task in hearing a case would be very tedious and the time taken to produce judgments would increase* ... (Emphasis added.)

FINDINGS OF THE COURT

[14] As discussed above, it is trite law that appellate intervention is warranted if the trial judge failed to evaluate the evidence and issue before him in its entirety and made bare findings of fact with no justifiable reason to substantiate them (*MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428). Upon perusal of the records of appeal and having considered the written and oral submissions by the parties, I find an appellate intervention is not warranted. My reasons are stated below.

[15] After reviewing the evidence presented, I agree with the magistrate's finding that the plaintiff successfully proved his case against the defendant. The plaintiff and defendant signed the agreement on 3 January 2020, in the presence of a commissioner for oaths. The agreement was stamped on 9 January 2020 and delivered to the defendant on the same day he received the loan in cash for the amount of RM30,000 from the plaintiff. The defendant, however, did not provide any evidence to support his claims, leaving them as mere denials.

[16] Furthermore, the defendant did not file a cross-appeal on these findings, even though an attempt was made to challenge them at the appeal stage. At the same time, however, the learned counsel for the defendant argued that this court should uphold the magistrate's decision, emphasising that the magistrate, who had the benefit of hearing the witnesses' oral testimony, observing their demeanour, and carefully evaluating the evidence, was in the best position to assess the facts and make findings of fact.

[17] Nevertheless, the plaintiff's claim was dismissed due to non-compliance with s 21 of the Moneylenders Act, a mandatory requirement.

[18] Section 21(1) of the Moneylenders Act states as follows:

> 21 Accounts under section 19 to be produced when suing in Court
>
> (1) Where proceedings are taken in any Court by a licensee for the recovery of any money lent after the commencement of this Act or the enforcement of any moneylending agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, he shall produce a statement of his account as prescribed in section 19.

[19] The statement of account to be produced as prescribed in s 19 of the Moneylenders Act is as follows:

> 19 Obligation to supply information as to state of loan and copies of documents relating thereto
>
> (1) In respect of every moneylending agreement with regard to money lent by a licensee whether made before or after the commencement of this Act the licensee shall, on any reasonable demand in writing being made by the borrower at any time during the continuance of the moneylending agreement and on tender by the borrower of the sum of three ringgit for expenses, supply to the borrower or, if the borrower so requires, to any person specified in that behalf in the demand, a statement of account in English figures signed by the licensee showing —
>
> (a) the date on which the loan was made, the amount of the principal of the loan and the rate per centum per annum or the amount of interest charged; and

(b) the amount of any payment already received by the licensee in respect of the loan and the date on which it was made; and

(c) the amount of all sums due to the licensee for principal but unpaid and the dates upon which they became due and the amount of interest due and unpaid in respect of each such sum; and

(d) the amount of every sum not yet due which remains outstanding and the date upon which it will become due.

[20] Section 21 of the Moneylenders Act requires the moneylender to produce the statement of account as prescribed in s 19 of the Act, at the time of filing the writ of summons in order to determine the exact amount owed by the borrower.

[21] The plaintiff argued that at all relevant times, the defendant was fully aware of the amount owed and admitted during the trial that no repayment had been made. There was no dispute over the outstanding amount. Furthermore, the defendant did not raise any defence regarding loan repayment in the statement of defence.

[22] In light of this, the plaintiff contended that the production of the statement of account was irrelevant, as it would not alter the fact that the defendant admitted to not repaying the loan.

[23] Moreover, the defendant's statement of defence did not plead non-compliance with s 21 of the Moneylenders Act. Since the defendant did not plead this issue, it should not be allowed to be raised on appeal. To support this argument the learned counsel for the plaintiff cited the Federal Court case of *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662; [2020] 5 MLRA 98 where the court held that:

> [66] It is trite that parties are bound by their pleadings, or the lack of it. What a party does not plead, he cannot lead fact or issues on the non-pleaded facts. Again, *Samuel Naik* case is instructive on this point. Learned Justice Ali FCJ writing on behalf of the apex court in the *Samuel Naik* case said as follows in the matter of the pleading point:
>
> > Parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded. Where a vital point is not raised in the pleadings it cannot be allowed to be argued and to succeed on appeal.
>
> ...
>
> [68] Indeed, the courts should only consider the pleaded case of the parties before them. In *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd* [2003] 2 MLRA 313, it was said that:

A But once a defendant takes that course, he must stand and fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct.

B **[24]** Therefore, the plaintiff argued that having failed to plead the alleged non-compliance of s 21 of the Moneylenders Act, the defendant should not be allowed to raise this issue during submissions before the magistrates' court. The magistrate should only consider the facts and defences explicitly pleaded in the defendant's statement of defence.

C

[25] The learned counsel for the plaintiff referred to the Federal Court case of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665 where it was established that issues not pleaded should not be introduced, and the court is not tasked with
D inventing or creating a cause of action or defence under the guise of administering justice.

[26] In this court, when questioned by the court, the learned counsel for the plaintiff admitted that compliance with s 21 of the Moneylenders Act is
E mandatory. He also agreed that the question of law does not need to be pleaded, but the material facts in relation thereto must be pleaded.

[27] The learned counsel for the plaintiff also conceded that a statement of
F account prescribed under s 19 of the Moneylenders Act was not produced when the writ and statement of claim was filed as required under s 21 of the Moneylenders Act.

[28] The Preamble of the Moneylenders Act which states 'An Act for the
G regulation and control of the business of moneylending, the protection of borrowers of the monies lent in the course of such business, and matters connected therewith', clearly reflects its intent to protect borrowers, making it beyond dispute that the Act was designed to regulate and control the business of moneylending, with borrower protection as a primary objective.

H

[29] In line with that objective, it is settled law that the provisions of the Moneylenders Act must be strictly complied with, and any deviation will not receive the favour of the court.

I

[30] As such, compliance with s 21 of the Moneylenders Act is mandatory, when a moneylender initiates a proceeding, a statement of account, as prescribed under s 19 of the Act, must be submitted at the time the suit is filed. Non-compliance with this statutory requirement constitutes an irregularity

that the court cannot ignore, entitling the defendant to have the suit dismissed with costs.

[31] Given that the Moneylenders Act's purpose is to safeguard borrowers and not merely to confer a benefit upon them, the question arises: can non-compliance with s 21 of the Moneylenders Act be excused or overlooked simply because the defendant was aware of the amount owed and purportedly 'waived' the need for compliance? The answer must be no, as this provision was enacted specifically to protect the borrower, and any failure to comply undermines that fundamental protection (see *Powernet Industries Sdn Bhd v Golden Wheel Credit Sdn Bhd* [2020] 12 MLJ 412).

[32] Hence, consistently, the courts have upheld the position of protecting borrowers, affirming that the provisions of the Moneylenders Act must be strictly enforced.

[33] In the case of *Aseam Credit Sdn Bhd v Eminent Avenue Sdn Bhd* [2008] 1 MLJ 441, the Court of Appeal stated that:

> With these findings, the back of the appellant's argument had been broken. *It was now shorn off of any protection and left standing as a mere moneylender, subject to the full force of the provisions of the Moneylenders Act 1951.* We were in total agreement with the appeal judge's factual finding that:
>
> (1) the appellant had not given a copy of the note or memorandum of the moneylender's contract to the borrower, hence contravening s 16 of the Act;
>
> (2) the appellant had imposed compound interest in the agreement contrary to s 17 of the Act;
>
> (3) *no accounts were tendered in court by the appellant when commencing this action thus contravening s 21 of the Act*;
>
> (4) the appellant had imposed an interest at the rate of 16% contrary to s 22 of the Act; and
>
> (5) by imposing costs, charges and other expenses the appellant had contravened s 23 of the Act.
>
> *There is no shortage of authority, both English and local, that states that the provisions of the Moneylenders Act 1951 must be strictly complied with, the detraction of which will not get the sympathy of any court* (*Kartar Singh v Mahinder Singh* [1959] 1 MLJ 248; *Subchent Kaur v Chai Sau Kian* [1958] 1 MLJ 32; *Teja Singh v Rattan Singh* [1961] 1 MLJ 39; *Arjan Singh Son of Inder Singh v Hashim Angullia & Ors* [1941] 1 MLJ 55). Founded on those findings of facts, that the appellant had not sufficiently established that it was an exempted entity at the relevant time, coupled with the obvious evidence that it had breached a large number of provisions in the Moneylenders Act 1951, we were satisfied that 'cause to the contrary' had been established within the meaning of s 256(3) of the National Land Code. *We thus*

unanimously had no reservation in dismissing this appeal with costs. (Emphasis added.)

[34] Furthermore, in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, the Court of Appeal held:

There are three other points that I think maybe conveniently made now. The first is that O 79 r 5 of the RHC calls for mandatory compliance of the requirements of rr 2 and 3 where a moneylender's action is begun by originating summons. Since the respondent did not comply with the requirements of O 79 of the RHC, it follows that its originating summons was fatally flawed. *An additional flaw that fatally infected the application for foreclosure was the non-compliance with the mandatory provisions of s 21 of the Act. These matters, in particular the breach of the statute, had the effect, in my view, of rendering the respondent's originating summons a nullity.* If authority is required in support of this view, it is to be found in the judgment of the former Court of Appeal in *Teja Singh v Rattan Singh* [1961] 1 MLJ 39, where Thomson CJ said:

> For myself I do not consider it necessary to examine the grounds of appeal in detail. The law in this country is perfectly well settled and has been settled since as long ago as 1941. It is no case of a moneylender being taken by surprise by a new technical defence. The law has been well known to the moneylending community since 1941 and was discussed as recently as 1956 in the case of *Ramasamy Chettiar v Wong Poh Fatt* [1960] 1 MLJ 43 where Pretheroe J, after referring to the decision of Terrell J, in the earlier case of *Arjan Singh v Hashim Angullia & Ors* [1941] 1 MLJ 55 held (I am reading from the headnote):
>
> > *When a moneylender embarks on any proceedings in any court, a statement of his account as prescribed by s 21(1) of the Moneylenders Ordinance 1951, must be produced at the time the originating summons was filed. Non-compliance with this statutory requirement is an irregularity which the court cannot waive and will entitle the respondent to have the originating summons dismissed with costs.*
>
> It is beyond doubt that this case falls clearly within these words. *The account was not produced when the originating summons was issued and that was fatal to any subsequent proceedings on that summons.* (Emphasis added.)

[35] The Court of Appeal in *AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd and another appeal* [2008] 4 MLJ 487 (CA) held that:

[139] ... *The Moneylenders Act 1951 (Act 400) have been enacted by the legislature for the protection of the borrowers and the moneylender has only himself to blame if he does not comply strictly with the provisions therein* (*F Xavier v K Kathamuthu Konar* [1958] 1 MLJ 286; and *Ang Khye Pang v Chop Ban Aik* [1939] 1 MLJ 282). According to the case of *Kartar Singh v Mahinder Singh* [1959] 1 MLJ 248, moneylenders must learn the importance of strict compliance with the technical requirements of the Ordinance if they wish to recover their money. And according to Raja Azlan Shah J (as His Royal Highness then was) in *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124, at p 126 that:

> This is indeed a lesson to be learnt by moneylenders in future to be more careful

> when lending money on a security and also to be sure that the Moneylenders Ordinance has been fully complied with the Moneylenders Ordinance is calculated to protect borrowers from unscrupulous moneylenders but careless moneylenders are also caught by it.
>
> [140] Finally, Smith J in *Teja Singh v K Periasamy* [1958] 1 MLJ 81, at p 83 aptly said that *the court may have sympathy for the moneylenders who may lose their claim on a technical ground but the court 'cannot fly in the face of the Moneylenders Ordinance.* (Emphasis added.)

[36] All these authorities underscore the necessity of strict adherence to the provisions of the Moneylenders Act. Consequently, the plaintiff's failure to comply with s 21 of the Act cannot be disregarded, overlooked, or excused. Hence, the plaintiff's claim should be dismissed.

[37] The plaintiff contended that for the court to rule on an issue, it must be pleaded and argued that the defendant did not plead non-compliance with s 21. While it is trite that the question of law does not need to be pleaded, the defendant is still required to present facts that could support such a legal conclusion. Upon reviewing the defendant's statement of defence, I find the defendant did plead that the statement of account was not provided and that the plaintiff had not complied with the provisions of the Moneylenders Act, as stated in para 11 of the statement of defence.

[38] However, it is the considered view of this court, as compliance with s 21 of the Moneylenders Act is mandatory, the defendant is not obligated to specifically plead or inform the plaintiff that the statement of account was not attached to the writ and statement of claim pursuant to s 21 of the Act. The Act imposes the burden of strict adherence to its provisions on the moneylender, not the borrower. Therefore, the plaintiff's argument lacks merit.

[39] The plaintiff further argued that the defendant never raised the alleged non-compliance with s 21 of the Moneylenders Act at any point during the pleadings or throughout the trial, indicating a failure to assert his rights in a timely manner. From the time the statement of defence was filed on 4 January 2022, until the filing of written submissions after the full trial on 29 March 2023, the issue of s 21 of the Moneylenders Act was not mentioned. It was only more than a year later, at the time of filing written submissions, just before the magistrates' court decision, that the defendant raised the issue in the written submissions, catching the plaintiff by surprise and leaving no opportunity to address the matter. This last-minute introduction created serious prejudice, as the issue had not been previously pleaded or discussed.

[40] The plaintiff contended that, although the magistrate found the plaintiff had established a case against the defendant, the case was dismissed

solely due to the alleged non-compliance with s 21 of the Moneylenders Act, which was unjust since the defendant had admitted to not repaying the borrowed amount.

[41] The learned counsel for the plaintiff contended that by raising the s 21 of the Moneylenders Act issue after acknowledging the lack of repayments, the defendant took advantage of the situation, causing undue prejudice to the plaintiff. This approach undermined the fairness of the proceedings, as the issue was introduced at the final stage, depriving the plaintiff of a fair opportunity to respond.

[42] To reiterate, the obligation to comply with the provisions of the Moneylenders Act rests with the plaintiff, not the defendant. Compliance is mandatory, and the fact that the defendant raised the issue of non-compliance with s 21 only at the stage of written submissions does not exempt the court from enforcing these legal requirements. The court cannot overlook the plaintiff's failure to meet these obligations, regardless of whether it results in prejudice or denies the plaintiff a fair opportunity to respond. Any alleged prejudice or lack of opportunity is ultimately due to the plaintiff's own negligence or oversight. The plaintiff cannot now claim unfair treatment or shift the blame to the defendant for not providing notice of the non-compliance. The responsibility lies solely with the plaintiff, who is expected to be fully aware of and adhere to the legal requirements governing his trade (see *Shanmuganathan a/l Venugopal v Azizie bin Din* [2015] MLJU 1967; [2015] 5 CLJ 1096).

RESTITUTION UNDER S 66 OF THE CONTRACTS ACT 1950

[43] Alternatively, the plaintiff argued that if this court finds that s 21 of the Moneylenders Act has not been complied with, resulting in the dismissal of the plaintiff's claim, the plaintiff is entitled to a remedy of restitution under s 66 of the Contracts Act 1950 ('the Contracts Act'). The plaintiff maintained that the magistrate did not address whether the agreement was unenforceable or tainted by illegality, and that the dismissal was solely based on the alleged non-compliance with s 21.

[44] The plaintiff contended that the agreement is valid and binding, with both parties intending to be bound by its terms. Furthermore, the plaintiff asserted that the magistrate failed to consider that the remedy of restitution is available to the plaintiff.

[45] Section 66 of the Contracts Act states that:

> 66 Obligation of person who has received advantage under void agreement, or contract that becomes void

When an *agreement is discovered to be void, or when a contract becomes void*, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. (Emphasis added.)

[46] Although the magistrate acknowledged that the plaintiff had proven his case against the defendant and recognised the defendant's non-payment of the loan, the magistrate declined to award restitution because it was not specifically pleaded by the plaintiff. The plaintiff argued that s 66 of the Contracts Act entitles him to restitution, requiring the defendant to return the principal sum of RM30,000 that was taken.

[47] The plaintiff cited the case of *Menaka v Lum Kum Chum* [1977] 1 MLJ 91; [1976] 1 LNS 181 (*Menaka*), stating that the circumstances were somewhat similar to the present case. In that case, the appellant's claim was dismissed due to non-compliance with the Moneylenders Ordinance; however, the Privy Council ruled that the appellant was still entitled to recover the principal sum provided to the respondent. This precedent supports the plaintiff's position that, despite the dismissal of the claim, restitution for the principal sum should still be granted. The Privy Council held that:

(1) The appellant in this case had contravened para (c) of s 8 of the Moneylenders Ordinance and therefore the contract and the security were unenforceable;

(2) In the circumstances of this case as neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith, the appellant was entitled to restitution of the balance of the principal sum of $19,400;

(3) The award of interest was in the discretion of the court and in this case as it had not been shown that the Federal Court committed any error of law in the exercise of their discretion, their decision will be upheld.

...

... Neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith. The contract was 'discovered' to be void only after these proceedings had been started. Section 66 of the Contracts Ordinance therefore applies and both parties before this Board accepted that it does. Section 66 provides as follows:

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it; or to make compensation for it, to the person from whom he received it.

...

The result of s 65 of the Indian Contract Act was that, as from (the date on which

A the contract became void) each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale.

B Section 65 of the Indian Contract Act, 1872, is in terms identical with those of s 66 of the Contracts (Malay States) Ordinance, 1950. The principle underlying both sections is the same and it is that 'a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation.

C **[48]** The plaintiff argued that the non-compliance with s 21 of the Moneylenders Act, specifically the absence of a statement of account attached to the statement of claim at the time of filing, was a matter that both parties were unaware of during the initiation of the legal action. The plaintiff contended that at the time the money lending agreement was executed, both parties intended to be bound by its terms, and there was no dispute regarding D the defendant's acceptance of the agreement. Therefore, the alleged non-compliance was only discovered at the trial stage, and both parties were unaware of it when the contract was formed.

E **[49]** Given that the parties entered into a legally binding agreement without knowledge of the non-compliance, the plaintiff asserted that he is entitled to restitution under s 66 of the Contracts Act. The plaintiff maintained that sufficient documentary evidence was presented during the trial to establish the existence of a binding agreement. Since the issue of non-compliance only emerged during the trial and was not previously pleaded by the defendant, the F plaintiff emphasised that this should not negate the validity of the agreement nor his right to restitution.

G **[50]** The plaintiff further argued that, in the case of *Menaka*, the Privy Council held that the award of interest is at the court's discretion. The court referenced *Harnath Kaur v Indar Bahadur Singh* (1922) LR 50 Ind App 69, in which interest was awarded to the Appellant upon restitution starting from the date the suit was instituted, rather than from the date of the Money Lending agreement. Therefore, the plaintiff contended that since the agreement was H deemed unenforceable, he is entitled to the discretionary remedy of restitution, which requires the defendant to return the benefits gained from the agreement, especially given the defendant's admission of defaulting on repayments.

I **[51]** The plaintiff contended that this restitution could include interest calculated from the date the writ was filed, 7 December 2021, as the parties intended for interest to be binding based on the agreement, which specified an 18%pa rate. The plaintiff maintained that the court has the discretion to award interest, and considering the facts of the case, both parties intended the agreement to be binding, with the interest terms clearly stated and undisputed.

[52] The plaintiff also referred to the case of *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997 in support of his argument.

[53] The plaintiff argued that, given the facts of the case, he could not plead for the remedy of restitution in the statement of claim, as the alleged non-compliance only became apparent at the time the writ and statement of claim were filed. Restitution cannot be claimed unless the issue is raised in the defendant's defence, which would allow the plaintiff to amend his statement of claim accordingly. The plaintiff contended that it is the responsibility of the magistrate to exercise discretion in awarding restitution upon dismissing the claim. Additionally, in *Orix Credit Malaysia Sdn Bhd v Mohd Ikbal bin Ismail & Anor* [2010] 1 LNS 1942 (*Orix Credit*), the High Court held that the remedy of restitution need not be explicitly pleaded due to its nature as a point of law, a principle that similarly applies to the remedy of estoppel. The High Court held:

> [15] The learned counsel for the first defendant had objected to this course of action be even considered and he had submitted, not without basis i must say, that the matter of restitution was not specifically pleaded by the plaintiff in its statement of claim against his client. The O 18 of the Rules of the High Court 1980 was and indeed must be referred to. Rule 7 of O 18 1980 provides that facts not evidence must be pleaded. Rule 8 then states the matters that must be pleaded but it does not state that law must be specifically pleaded. Rule 11 of the same O 18 does say though, that points of law may be pleaded. Having considered the submissions I am of the view that the *rules as contained under O 18 do not provide as a mandatory requirement that points of law must be pleaded in the pleadings. I agree with the submission of the plaintiff's learned counsel that a party does not have to expressly plead restitution (which is a point of law) as the statement of claim is meant to contain only facts, not the evidence or the law. in fact, it was impressed upon this court by learned counsel for the plaintiff, that an analogy could be drawn with the legal issue of estoppel which was not pleaded in the case of Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd* [2004] MLJU 758; [2004] 4 CLJ 18. *The Court of Appeal in that case had held in that case that 'Although the plaintiff's pleaded case did not expressly raise estoppel, all relevant facts on which an estoppel might arise were pleaded. That was sufficient and an express plea was not necessary'.* I agree that such attempt at the stated analogy was valid. Likewise in this case before this court, the same circumstances had obtained and as such what the appeal court had said in the *Masjaya Trading* case must therefore apply in full force here as well. Premised upon that consideration, I would dismiss the objection raised by the learned counsel for the first defendant in that regard.
>
> [16] Perhaps it would be useful at this stage to see what the state of the law is regarding the invocation of s 66 of the Contracts Act 1950. A short reference to a few decided cases of high authority maybe helpful as they are hardly controversial. The case that would readily come to mind on s 66 of the Contracts Act 1950 must be the Privy Council case of *Menaka v Lum Kum Chum* [1977] 1 MLJ 91; [1976] 1 LNS 181 which effectively held that the respondent moneylender who had

A contravened s 8 of the Moneylenders Ordinance and who therefore could not enforce his illegal contract with the appellant on account of the illegality, was entitled to recover the same sum that was lent to the appellant under s 66 of the Contracts Act as the respondent was not aware of the illegality of the transaction at the time of the execution of the documents and that the illegality was discovered B subsequent thereto. Similarly in the case of *Ahmad bin Udoh & anor v Ng Aik Chong* [1970] 1 MLJ 82 the Federal Court had ruled in favour of the respondent by invoking s 66 of the Contracts Act 1950 as the parties were ignorant that they were in fact executing an illegal agreement, thereby entitling him to be restituted by the appellant of the advantage which the appellant had derived from him. (Emphasis C added.)

[54] After reviewing the evidence, I find that the agreement between the plaintiff and defendant remains a valid contract. However, the plaintiff's case failed due to the non-compliance with s 21 of the Moneylenders Act, which D proved fatal to the claim.

[55] This court concluded that the remedy of restitution is not available to the plaintiff for two reasons. First, the plaintiff did not include an alternative plea for restitution to recover the principal sum, nor did he plead that the E defendant would be unjustly enriched by failing to return the principal sum. It is a fundamental principle that parties are bound by their pleadings. Additionally, the plaintiff's claim that restitution need not be pleaded as a matter of law is misguided, as the High Court in *Orix Credit* explicitly held otherwise. The court stated:

F Having considered the submissions I am of the view that the rules as contained under O 18 do not provide as a mandatory requirement that points of law must be pleaded in the pleadings. I agree with the submission of the plaintiff's learned counsel *that a party does not have to expressly plead restitution (which is a point of law) as the statement of claim is meant to contain only facts, not the evidence or the law. In* G *fact, it was impressed upon this court by learned counsel for the plaintiff, that an analogy could be drawn with the legal issue of estoppel which was not pleaded in the case of Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd* [2004] MLJU 758; [2004] 4 CLJ 18. *The Court of Appeal in that case had held in that case that 'Although the plaintiff's pleaded case did not expressly raise estoppel, all relevant facts on which an* H *estoppel might arise were pleaded. That was sufficient and an express plea was not necessary'.* I agree that such attempt at the stated analogy was valid. (Emphasis added.)

Thus, based on the reasoning in *Orix Credit*, it is clear that while restitution I does not need to be explicitly pleaded, the facts supporting a claim for restitution must still be included in the pleadings.

[56] Furthermore, the Court of Appeal in the case of *Mahmood bin Ooyub v Li Chee Loong and another appeal* [2020] 6 MLJ 755, decided that restitution

must be pleaded. The Court of Appeal stated that:

> Whether this court should order restitution in that there would be unjust enrichment if even the balance principal sum is not repaid
>
> [257] *To begin with the lenders had not pleaded this in their respective statement of claims. We cannot give a relief not pleaded especially when the case was not fought on the alternative plea that if it is a moneylending transaction then the court should grant judgment for the principal balance sum not paid*.
>
> [258] *Parties are bound by their pleadings and they cannot approbate and reprobate. See Samuel Naik's case*. Having gone for broke as it were in confidently asserting that it was a sale and purchase transaction, it is *then too late to now want to claw back on the high moral ground of unjust enrichment.* (Emphasis added.)

[57] Also, in the case of *Shanmuganathan a/l Venugopal v Azizie bin Din*, the High Court held that restitution must be pleaded. The vourt stated:

> Fourth Issue: Section 66 of the Contracts Act
>
> [24] I now turn to the fourth and last issue premised on s 66 of the Contracts Act. Section 66 provides:
>
> > When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.
>
> [25] The plaintiff contended that the magistrate was wrong in refusing to grant relief under s 66 when she held that the moneylending agreement was void and not enforceable for contravention of s 16. It was common ground that the magistrate declined to do so on the basis that it was not part of the plaintiff's pleaded case and was only raised during submissions. It is apposite to mention here that the magistrate did not deal with the plaintiff's claim for relief under s 66 in her grounds of judgment though it was raised and argued in submission.
>
> [26] The scope of s 66 has received judicial consideration in numerous cases. *It has been held that the principle of restitution embodied in s 66 does not apply to all void contracts but only to a contract that is discovered to be void ab initio or when it becomes void. To invoke this relief the invalidity of the contract should be discovered subsequent to the making of it and the illegality must be unbeknown to the person invoking it.* Section 66 does not make a new contract between the parties but only provides for the restitution of the advantage taken by a party under the contract. It does not work in one favour of only one party but requires both parties to restore their respective benefits derived under the void contract.
>
> [27] Section 66 of the Contracts Act has been applied in moneylending cases where the moneylending agreements were found to be void and unenforceable due to contravention of the Moneylenders Ordinance by requiring the borrower to return the money borrowed. In *Menaka v Lum Kum Chum (at para [13]) the court allowed relief under s 66 since the appellant was not aware of the illegality of the transaction at the time they executed the agreement.*

[28] In *Yee Hoong Loong Corpn Sdn Bhd v Kwong Fook Seng Co* [1993] 1 MLJ 163, Peh Swee Chin J observed at 167:

> Under s 66 of the Contracts Act 1950, a court can lawfully order reasonable compensation for any benefit obtained and given under a contract by any party when the contract is found to be void for any valid legal reason whatsoever, provided t*hat both parties or the party seeking such reasonable compensation, did not know at the time of contract that it was not valid.* Reasonable compensation would be the same in my opinion as quantum meruit, the latter expression being just a name of a remedy for reasonable compensation used in various contexts.

[29] In *Soh Eng Keng v Lim Chin Wah* [1979] 2 MLJ 91; [1979] 1 LNS 98, Wan Yahya J observed:

> To my mind, this section has to be applied with care and is not open to indiscriminate use by unlicensed moneylenders whose claims have been defeated by reason of the contravention of the provisions of the Moneylenders Ordinance, 1951. *Section 66 of the Contracts Act is not intended to override those provisions of the Moneylenders Act which make contracts in moneylending transactions void but is meant to provide some relief to a party whose right in an agreement has become unenforceable through no fault of his own making.*
>
> I am of the firm opinion that the words 'discovered' and 'becomes' appearing in s 66 above are not superfluous words used by the legislators. On the contrary, they are words inserted in that section for a specific reason and that is to qualify or restrict the type of agreement to which that section will apply. *As I have said in the earlier case, the term 'discover' here clearly indicates something which the parties were unaware of at the time of making the agreement and which they gained sight of or detected subsequently and the word 'becomes' refers to something not present w hen the contract was signed but came into being at a later stage.*

[30] *Based on the foregoing, it is clear that the plaintiff would be entitled to restitution if it can satisfy the preconditions under s 66. In the present case, the magistrate as stated earlier, refused restitution as the plaintiff had not sought this relief in his claim. The question of whether a claim for restitution can be sought where this relief is not specifically pleaded in the alternative is not a matter which has received judicial consideration and I have not been referred to any authorities upon it. In the absence of any authority to support the position taken by the plaintiff that it need not be pleaded, I would reject it. It is an elementary rule that parties are bound by their pleadings.* Had the matter been pleaded or particularised, the defendant might well have produced evidence to rebut the claim for restitution. In these circumstances, the claim should not now be permitted to be raised. In my judgment in a case where a defendant sets up a plea that the contract is void, it is incumbent on a plaintiff to amend his claim to include relief under the section.

[31] But even if I am wrong about that, *there is another ground on which it can be said that the claim for restitution is bound to fail. This is based on the principle that to invoke s 66, the applicant must show that he was unaware of the illegality at the time of the transaction in question*. In the present case, there is no evidence that the plaintiff was unaware of the illegality of the moneylending agreement at the time it was signed. *Indeed it is not open to a licensed moneylender to plead so because it is his business to*

know the provisions of the law pertaining to his trade. (Emphasis added.)

[58] The Court of Appeal in the case of *Simcity-ETE Venture Sdn Bhd v Koperasi Pembangunan Kampung Tradisional Tasek Pulau Pinang Bhd* [2021] MLJU 2225 held that the claim for restitution based on unjust enrichment is a cause of action by itself and it must be established in the statement of claim within a proper and specific plea. The court held:

> [37] On the first matter, the Federal Court in the *Dream Property*'s case have found that it is necessary to make available the right to restitution of remedy as a response to unjust enrichment, independent of the law of contract and torts. In other wordswords, *claim for restitution based on unjust enrichment is a cause of action by itself. Therefore, the cause of action must be established in the statement of claim within a proper and specific plea. Material particulars that give effect to the alleged unjust enrichment must be provided in the pleadings.* (Emphasis added.)

[59] In the present case, the plaintiff has failed to provide any legal authority regarding the possibility of seeking restitution when this relief has not been explicitly pleaded as an alternative. Without any supporting authority for the plaintiff's position that such a claim need not be pleaded, I must reject that assertion.

[60] Furthermore, the Rules of Court 2012 do not prevent the plaintiff from amending his statement of claim to include an alternative plea for restitution of the principal amount once he became aware of the issue during the submission stage; however, the plaintiff took no such action'.

[61] Secondly, from the decided cases cited above, it is apparent that for the plaintiff to rely on s 66 of the Contracts Act, he must demonstrate that he was unaware of the illegality at the time of the transaction. The principle of restitution under s 66 applies only to contracts that are either discovered to be void from the outset, void ab initio, or that become void at a later stage. To invoke this relief, the illegality must be something unknown to the parties when the agreement was made and only identified or detected afterwards. The term 'becomes' indicates a circumstance that was not present when the contract was signed but emerged later.

[62] In this case, the agreement between the plaintiff and the defendant is valid, not void. The plaintiff is a licensed moneylender, and both parties entered into a binding Money Lending agreement, which remains undisputed. The sum of RM30,000 was disbursed to the defendant in accordance with the terms of this agreement, and there are no allegations of illegality associated with it. As noted earlier, the magistrate found that the plaintiff had established his claim; however, the claim was ultimately dismissed due to non-compliance with s 21 of the Moneylenders Act, specifically the failure to attach the required

A statement of account to the writ and statement of claim at the time of filing. This procedural lapse does not render the agreement illegal, void ab initio, or void at a later stage but renders the plaintiff's writ and statement of claim a nullity (see: *Chee Pok Choy & Scotch Leasing Sdn Bhd*). Consequently, the plaintiff cannot invoke s 66 of the Contracts Act, and the remedy of restitution B is not available in this context.

[63] Unlike the circumstances in *Menaka*, where the agreement involved an unauthorised party and was thus deemed *void ab initio*, no such illegality or void status affects the current agreement between the plaintiff and the C defendant. As established in *Soh Eng Keng v Lim Chin Wah* [1979] 2 MLJ 91, s 66 is not intended to supersede the provisions of the Moneylenders Act that can render certain contracts void; instead, it provides relief to parties whose agreements have become unenforceable due to factors beyond their control. In this instance, the plaintiff's claim was dismissed due to his own failure to D comply with the statutory requirements under s 19 of the Moneylenders Act, as mandated by s 21 of the Act, at the time he filed his writ and statement of claim. The obligation to fulfil these requirements was within the plaintiff's control, and the subsequent discovery of non-compliance of s 21 of the said Act does not change or invalidate the agreement retroactively. In other words, the E agreement remains valid despite the later realisation of the procedural issue. Therefore, it is my considered view that the remedy for restitution is not applicable in this circumstance.

F **[64]** However, even if I am mistaken, allowing the plaintiff's claim, even for the principal sum, would effectively permit a moneylender-even a licensed one-to disregard the strict requirements imposed by the Moneylenders Act. This would erode the integrity of the legal safeguards that the courts have consistently upheld to ensure compliance with the Act. In the case of *Golden Wheel Credit Sdn Bhd v Dato' Siah Teong Din* [2023] 11 MLJ 647; [2023] 6 G CLJ 438, the court held that:

> [83] Accordingly, if the plaintiff were to be permitted to claim the loan sum even if the same is confined only to the principal sum, it will mean that a moneylender is free to flout the strict requirements imposed under the Moneylenders Act 1951 H without any risks or with little adverse repercussions. This will clearly result in stultifying the intention and policy behind the Moneylenders Act 1951.

[65] In the circumstances of this case, the plaintiff bears sole responsibility for failing to comply with the provisions of the Moneylenders Act, as it is I incumbent upon him to be knowledgeable about the legal requirements governing his business.

[66] Having considered the evidence in its entirety, I find the magistrate had not erred in facts and law in making her findings and decision on issues raised

in this appeal. I find there were no substantial and compelling reasons for this court to disagree with the said findings.

[67] For the reasons stated above, I, therefore, ordered that the plaintiff's appeal be dismissed with costs of RM8,000.

Appeal dismissed.

Reported by Ashok Kumar